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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 787

STATE ATHLETIC COMMISSION,
Appellant,

versus

JOSEPH DORSEY, JR.,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT.

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana,
Capitol,
Baton Rouge, Louisiana;

GEORGE PONDER,
First Assistant Attorney General,
State of Louisiana,
Capitol,
Baton Rouge, Louisiana;

WILLIAM P. SCHULER,
Assistant Attorney General,
Supreme Court Building,
New Orleans 12, Louisiana,
Attorneys for State Athletic Commission, Appellant.

Montgomery & Co., "The Brief Specialists", 430 Chartres St., N. O., La.

INDEX.

	Page
STATEMENT AS TO JURISDICTION	1
OPINION BELOW	2
BASIS OF JURISDICTION	2
THE FOLLOWING QUESTIONS ARE PRESENTED BY THIS APPEAL	3
STATEMENT OF THE CASE	4
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	6
CONCLUSION	13
AFFIDAVIT OF SERVICE PURSUANT TO RULE 33 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES	15
APPENDIX "A"	16
APPENDIX "B"	26

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STATE ATHLETIC COMMISSION,

Appellant,

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Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT.

STATEMENT AS TO JURISDICTION.

Appellant appeals from the judgment of the United States District Court for the Eastern District of Louisiana, sitting as a three-judge Court, entered on November 28th, 1958, declaring unconstitutional Louisiana Revised Statutes of 1950, 4:61; (Sec. 1 of Act 579 of 1956) and Rule 26 of the Rules and Regulations adopted by the State Athletic Commission, and further enjoining enforcement of said statute and rule; and appellant further submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW.

The opinion of the United States District Court for the Eastern District of Louisiana is not yet reported, however the judgment of the Court and the reasons therefor are attached hereto as Appendix "A".

BASIS OF JURISDICTION.

I.

This suit was brought under 28 USC 1331, 28 USC 1343 and 28 USC 2201 seeking a declaratory judgment as to the constitutionality of Rule 26 of the Rules and Regulations of the State Athletic Commission and Act 579 of 1956 of the Louisiana Legislature; and further seeking to have the Court enjoin the enforcement of the aforesaid Statute and regulation. The judgment of the District Court was entered on November 28, 1958, and Notice of Appeal was filed in that Court on December 24, 1958.

II.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, USC 1253, since the case was heard by a three-judge Court pursuant to 28 USC 2281-4.

III.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case.

Herkness v. Irion, 49 S. Ct. 40, 278 U. S. 92, 73 L. Ed. 198;

Palmetto Fire Ins. Co. v. Conn, 47 S. Ct. 88, 272 U. S. 295, 71 L. Ed. 243.

IV.

The following statutes of the State of Louisiana and Rules of the State Athletic Commission were held to be invalid:

Louisiana Revised Statutes of 1950, 4:61, (Sec. 1 of Act 579 of 1956).

Rule 26 of the Rules and Regulations of the State Athletic Commission.

THE FOLLOWING QUESTIONS ARE PRESENTED BY THIS APPEAL.

In declaring that Rule 26 of the Rules and Regulations of State Athletic Commission of Louisiana and La. R. S. 4:61 are unconstitutional insofar as they attempt to prohibit athletic contests between negroes and whites based solely upon contestant's race or color, and in restraining enforcement of the said act and rule did the District Court for the Eastern District of Louisiana commit error:

(a) In permitting a State body to be sued in Federal Court without the State's permission despite the specific denial of jurisdiction to do so contained in the 11th Amendment to the United States Constitution?

(b) In permitting the doctrine enunciated in *Brown v. Board of Education* to be extended into the field of professional boxing?

(c) In holding that the equal protection clause of the 14th Amendment limited the police power of the State to regulate by classification, participation in certain fields which would be illegal without legislative permission.

(d) In holding that the method of classification regulating boxing in the State of Louisiana between negroes and whites is contrary to the equal protection clause of the 14th Amendment?

(e) In permitting a person not holding a license to raise the question of discrimination in the exercise of rights which he might acquire under said license.

V.

STATEMENT OF THE CASE.

Complainant, Joseph Dorsey, Jr., a negro boxer, brought this action in July of 1955 against the State Athletic Commission, an agency of the State of Louisiana, seeking first a declaratory judgment as to the constitutionality of Rule 26 of the Rules and Regulations adopted by the State Athletic Commission, and secondly, a temporary and permanent injunction prohibiting the State Athletic Commission from enforcing Rule 26 of the Rules and Regulations of the State Athletic Commission against him or any other negro similarly situated on the basis that said regulation prohibiting fistic combat between negroes and whites was a deprivation of his rights under the equal protection clause of the United States Constitution.

On November 7, 1955, State Athletic Commission filed an answer admitting that the complainant is unable to engage in boxing contests with white fighters within the State of Louisiana, however, alleging that the defendant failed to state a claim upon which relief could be granted, and secondly, that the rules adopted by the State

Athletic Commission were made in exercise of the State Police power and did not discriminate against negroes.

On May 27, 1957, petitioner amended his complaint to include Act 579 of 1956, which Act prohibited boxing contests between negroes and whites. On June 3, 1950, State Athletic Commission filed an answer to the amended complaint admitting that Act 579 of 1956 would prohibit athletic contests between negroes and whites, and again pled that such an act would be a valid exercise of the police power of the State of Louisiana.

On October 11, 1957, plaintiff filed a motion for summary judgment and on October 23, 1957, defendant filed a motion to dismiss under Rule 12-B based on lack of jurisdiction of the Court and upon failure of the plaintiff to state a claim upon which relief could be granted. On October 30, 1957, both of these motions came on for hearing and on November 26, 1957, both the Motion for Summary Judgment and the Motion to Dismiss were denied by the Court.

On November 27, 1957, Honorable Joseph C. Hutcheson, Chief Judge of the Fifth Circuit Court of Appeals, designated the three judges to hear this case, and on January 13, 1958, a three-judge Court heard this cause on affidavits.

On November 28, 1958, the three-judge Court rendered judgment declaring that Rule 26 of the Rules and Regulations of the State Athletic Commission and Section 1 of Act 579 of 1956 were unconstitutional and, further,

enjoining enforcement by the State Athletic Commission, its officers, agents, servants, employes, and attorneys or their successors in office of Rule 26 of the State Athletic Commission or Section 1 of Act 579 of 1956. On December 24, 1958 the defendant, State Athletic Commission, filed a Notice of Appeal to the Supreme Court of the United States.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

The issues involved herein are substantially those of the rights of the sovereign states as opposed to the rights of the federal government, and the degree to which the rights of the states, under the Tenth and Eleventh Amendments to the U. S. Constitution, have been watered down or nullified by the adoption of the Fourteenth Amendment to the U. S. Constitution. In this particular case, the factual and legal situations present to the Court questions which have never been argued before it.

(a) The only defendant in this cause is the State Athletic Commission, an agency created by the Louisiana Legislature for the purpose of carrying out its mandates. The Legislature of the State of Louisiana, in creating said body, did not and has not, subsequently granted to the plaintiff herein the right to sue said agency in the Federal Court of the United States.

At this point, appellants are forced to concede that had this suit been brought against the members of the State Athletic Commission, a long line of jurisprudence by this Court would have sustained contention of the plaintiff that this could not be considered a suit against

the State of Louisiana, prohibited by the Eleventh Amendment to the United States Constitution.

As is apparent herein, there is no natural person before the Court against whom the plaintiff is proceeding, but only an agency of the state. This Court has recognized as early as 1828 that a suit against an official title is, in effect, a prohibited suit against a state. In the case of *Governor of Georgia v. Juan Madrazo*, 26 U. S. 110, 7 L. Ed. 73, the Court stated:

> "The decree is pronounced not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant, as the appealed bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him entirely in his official character, we think the State itself may be considered as a party on the record. If the State is not a party, there is no party against whom a decree can be made. **No person in his natural capacity is brought before the court as defendant.** This not being a proceeding against the thing, but against the person, **a person capable of appearing as a defendant against whom a decree can be pronounced must be a party to the cause before a decree can be regularly pronounced.**" (Emphasis supplied).

There is no doubt that the appellee herein can take no comfort in the long line of jurisprudence that state officials can be sued as individuals.

The landmark case for this legal fiction is the case of *Ex parte Young*, 209 U. S. 123, 28 S. Ct., 441, 52 L. Ed., 714, (1908), wherein the Court stated as follows:

> "In Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418 (Another rate case), it was again held that a suit against individuals, for the purpose of preventing them, as officers of the state, from enforcing, by the commencement of suits or by indictment, an unconstitutional enactment, to the injury of the rights of the plaintiff, was not a suit against a state within the meaning of the Amendment. At page 518, in answer to the objection that the suit was really against the state, it was said: 'It is the settled doctrine of this court **that a suit against individuals for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment, to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that Amendment.**' The suit was to enjoin the enforcement of a statute of Nebraska because it was alleged to be unconstitutional, on account of the rates being too low to afford some compensation to the company, and contrary, therefore, to the 14th Amendment."
>
> * * * * * *
>
> "The various authorities we have referred to furnish ample justification **for the assertion** that **individuals who, as officers of the state,** are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of

a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

* * * * * *

"The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, **and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct . . .**" (Emphasis supplied).

The reasoning used by the Court above cannot be applicable in this case since there is no natural individual whomsoever to proceed against, and should the court below be able to divest the State Athletic Commission of its status as a state agency, there would be nothing at all left to proceed against.

(b) In the school segregation cases, 1954, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, this Court held that in the field of public education the doctrine of "separate but equal" has no place, since separate educational facilities are inherently unequal. This principal, originally applicable only to children in public schools, has been extended to include golf courses, parks, beaches and swimming pools, and buses and street cars. Each of the above-mentioned services is a service rendered by the State or local government out of public funds to enhance the health, welfare and education of the public at large. Each of these services is one that is generally considered to be beneficial and desirable in the community.

On the other hand, the particular area of human conduct to be considered as a result of the facts set out in this matter, is that of professional boxing. It would seem difficult, if at all possible, to apply the same legal principles to the field of professional boxing, as to public education of children or public transportation. Unlike useful and beneficial pursuits, professional boxing has, again and again, in many states in these United States, been declared an unlawful act. This was true even in the District of Columbia until said law was repealed. At the present time, professional boxing in the State of Louisiana would be a penal offense except for the special privilege granted by the Legislature.

Under these circumstances, appellant does not feel that this case should be considered in the light of the *Brown v. Board of Education* cases, or cases in other fields which have followed the decision in the *Brown* case.

(c) The status of professional boxing in the sovereign states of the United States may be placed in either of two categories. First, the states in which prizefighting by statutes is made a crime, and secondly, states in which statutory permission to engage in professional boxing has been granted, provided that all such contests are conducted pursuant to and in conformance with the rules and regulations laid down either by statute or by the rules of a commission or board created by the State for that purpose. Either of these two categories recognize that the State, as an exercise of its police power, has the right to regulate or even prohibit professional boxing within its state limits.

The great weight of authority has consistently held that the regulations of pugilistic contests are within the police power of the state, and that the Fourteenth Amendmend to the Federal Constitution does not protect any individual in the exercise of the rights granted by the State.

As recently as 1956, the Supreme Court of the State of Oregon, in the case of *State v. Hunter*, 300 Pac. (2d) 455, held that the Fourteenth Amendment to the United States Constitution did not interfere with the State's right to regulate boxing and wrestling contests. The Court said:

> "Moreover, there is no inherent right to engage in public exhibitions of boxing and wrestling. Both sports have long been licensed and regulated by penal statute, and in some cases, absolutely prohibited. It is axiomatic that the 14th Amend-

ment to the U. S. Constitution does not protect gross liberties which civilized states regard as properly subject to regulation by penal law."

The same line of reasoning has also been used in other cases.

Fitzsimmons v. N. Y. State Athletic Commission, (1914, 146 N. Y. Supp. 117, affirmed without opinion), 162 App. Div. 904, 147 N. Y. Supp. 1111.

Antlers Athletic Association v. Hartung (1928) 85 Colo. 1.5, 274 Pac. 831.

(d) Plaintiff herein contends that the classification of fighters into two groups, one white and one negro, and denying the right of one class to fight the other is a denial of equal protection of the laws under the Fourteenth Amendment of the United States Constitution. Exactly the converse is true. The prohibitions set forth in the law and the penalties for violation thereof, are exactly the same regardless of the fighter's color. The punishment prescribed is directed against the offense of engaging in a mixed fight and not against the person of any particular color or race. The punishment of each offending person, whether black or white, is the same. As a matter of fact, it is necessary that a person of both the negro and white race participate before an offense can be committed. Statutes of this type which prohibit negroes and whites from jointly following a certain course of action has been upheld many times.

Stevens v. U. S., 146 F. (2d) 120;

Pace v. Alabama, 106 U. S. 583, 1 S. Ct. 673, 27 L. Ed. 207.

(e) There is no dispute as to the fact that the plaintiff, Joseph Dorsey, Jr., was not, at the time this case was heard in the District Court, a person licensed to be a professional boxer in the state of Louisiana. The plaintiff herein did not allege or prove that his failure to obtain a license for the calendar year, 1958, at the time of the trial was in any way a result of discrimination or ill practices or an arbitrary ruling of the State Athletic Commission. As a matter of fact, the plaintiff has been issued licenses in previous years by the Athletic Commission. The plaintiff herein is not contesting the validity of the licensing law itself, but rather, the law which determines which licensed fighters may participate in pugilistic contests.

It is a rather well established concept of law that no person may challenge his rights and privileges granted to him under a license law until such time as he has made application and received a license. If such rule did not exist, the Court might, in many instances, be overwhelmed by a deluge of suits instituted by persons who would never be able to acquire any rights or privileges under a license since they might not be eligible therefor.

CONCLUSION.

It is submitted that the decision of the District Court failed to recognize the rights retained by the sovereign states in the United States Constitution and more particularly the Tenth and Eleventh Amendments thereto. We believe that the questions presented by this appeal are substantial and that they are of great importance

in determining the respective rights and duties of the states and the Federal Government.

Respectfully submitted,

JACK P. F. GREMILLION
Attorney General,
State of Louisiana,
Capitol,
Baton Rouge, Louisiana;

GEORGE PONDER,
First Assistant Attorney General.
State of Louisiana,
Capitol,
Baton Rouge, Louisiana;

WILLIAM P. SCHULER,
Assistant Attorney General,
Supreme Court Building,
New Orleans 12, Louisiana,
Attorneys for State Athletic Commission, Appellant.

PROOF OF SERVICE.

I, William P. Schuler, one of the attorneys for Louisiana State Athletic Commission, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of March, 1959, copies of the foregoing jurisdictional statement to the Supreme Court of the United States were served on the plaintiff herein by mailing same in duly addressed envelopes with first class postage prepaid to his attorneys of record, as follows:

To Louis Berry, Esq.,
Attorney at Law
2107 Dryades St.
New Orleans, La.

and copy sent air mail to:
1726 5th Street
Oakland, California

To Albion R. Ricard, Esq.
Attorney at Law
2123 Dryades St.
New Orleans, La.

.....

WILLIAM P. SCHULER,
Assistant Attorney General,
State of Louisiana.

APPENDIX "A".

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 5247
Civil Action

JOSEPH DORSEY, JR.,

Plaintiff,

versus

STATE ATHLETIC COMMISSION,

Defendants.

Louis Berry,
Albion R. Ricard,
Attorneys for Plaintiff.

W. P. Schuler,
Attorney for Defendants.

Before WISDOM, Circuit Judge, and CHRISTENBERRY and WRIGHT, District Judges, holding a Three Judge Statutory Court.[1]

[1] 28 USCA 2284.

WISDOM, Circuit Judge:

Joseph Dorsey, Jr. is a negro prizefighter. He brings this suit in his own behalf and in behalf of all other negro professional prizefighters similarly situated. He asks for a declaratory judgment and an injunction to restrain the Louisiana State Athletic Commission from enforcing a regulation and a statute prohibiting athletic contests between negroes and whites.

The State Athletic Commission is an agency of the State of Louisiana with "full authority, regulation, and control over all boxing and wrestling contests or exhibitions in the state". La. R. S. 1950, 4:61, Act 336 of 1950.

Rule 26 of the Rules and Regulations adopted by the Commission provides:

> "There shall be no fistic combat match, boxing, sparring, or wrestling contest or exhibition between any person of the Caucasian or 'white' race and one of the African or 'negro' race; and, further, it will not be allowed for them to appear on the same card."

Dorsey's original petition, filed July 28, 1955, attacked Rule 26 as unconstitutional. In 1956 the Louisiana legislature enacted Act 579 (La. R. S. 4:451 et seq.). This law prohibits "interracial activities involving personal and social contacts", including "games, sports or contests", and requires separate seating at any entertainment or athletic contest. May 24, 1957 Dorsey filed an amendment to his

petition, attacking the constitutionality of Section 1 of this law.[2] Section 1 of the Act reads:

"§451. Interracial activities involving personal and social contacts prohibited

All persons, firms and corporations are prohibited from sponsoring, arranging, participating in, or permitting on premises under their control any dancing, social functions, entertainments, athletic training, games, sports or contests and other such activities involving personal and social contacts,

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[2] The other sections of Act 557 are:

"§ 452 Separate seating and facilities

"At any entertainment or athletic contests, where the public is invited or may attend, the sponsors or those in control of the premises shall provide separate seating arrangements, and separate sanitary, drinking water and any other facilities for members of the white and negro races, and to mark such separate accommodations and facilities with signs printed in bold letters. Acts 1956, No. 579, § 2.

"§ 453. Races prohibited from using the others seating and facilities.

"White persons are prohibited from sitting in or using any part of seating arrangements and sanitary or other facilities set apart for members of the negro race; and members of the negro race are prohibited from sitting in or using any part of seating arrangements and sanitary or other facilities set apart for white persons. Acts 1956, No. 579, § 3.

"§ 454. Penalty.

"Any person, firm or corporation violating the provisions of this chapter shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than $100.00 or more than $1,000.00 and imprisoned for not less than 60 days nor more than 1 year. Acts 1956, No. 579, § 4.

"§ 455. Construction; effective date; religious gatherings exempt

"This chapter is passed in the exercise of the state police power to regulate public health, morals and to maintain peace and good order in the state and shall be so construed. This chapter shall not become effective until the fifteenth (15th) day of October 1956. None of the provisions of this chapter shall be construed to apply to religious gatherings, services or functions. Acts 1956, No. 579, § 5."

in which the participants or contestants are members of the white and negro races. Acts 1956, No. 579, §1."

There is no factual dispute. Dorsey was issued a license for 1957. He has no license for 1958, but the Commission's policy is to issue a license to a prizefighter only on the date of a scheduled fight and then only after the fight has been held and the boxer's license fee deducted from his share of the purse. The Commission admits the essential allegations of Dorsey's complaint and admits also that it would not allow Dorsey to engage in a mixed prizefight in Louisiana.

I.

The Commission contends that the court has no jurisdiction, on the ground that Dorsey's suit is in effect a suit against the State of Louisiana; and the Eleventh Amendment protects a state against being sued without its consent. In any event, the Commission argues, the plaintiff must sue state officials in their individual capacity; citing Ex Parte Young, 1908, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714. Here, Dorsey has not sued members of the Commission individually.

This question has been raised in several segregation suits. See School Board of Charlottesville v. Allen, 4 Cir., 1956, 240 F. 2d 59. This Court dealt with the problem in Orleans Parish School Board v. Bush, 5 Cir., 242 F. 2d 156, cert. den., 1957, 354 U. S. 921, 77 S. Ct. 1394, 1 L. Ed. (2d) 1435. The short answer to the Commission's contention is that Dorsey's suit is not against the State of Louisiana, in name or in effect. It does not attempt to com-

pel state action, but to prevent illegal action of the Commission. As Judge Tuttle stated in the Bush case: "If in fact the laws under which the Board here purports to act are invalid, then the Board is acting without authority from the state and the state is nowise involved." A state can act only through agents. Whether the agent is an individual official or a Commission, the agent ceases to represent the state when state power is used in violation of the United States Constitution.

There is no merit to the defendant's contention that the plaintiff should have sued the members of the boxing Commission individually. We agree with the court in School Board of Charlottesville v. Allen that, "if high officials of the state and federal government may be restrained and enjoined from unconstitutional action, we see no reason why a school board [or any other state Commission] should be exempt from such suit merely because it had been given corporate powers". In Browder v. Gayle, 142 F. Supp. 707, aff'd 352 U. S. 903, 77 S. Ct. 145, 1 L. Ed. (2d) 114, the court indicated that it is not necessary to sue the members of a Commission individually when no special relief is sought against them by way of damages. In the case before us the plaintiff is seeking relief from action of the state's agent, the State Athletic Commission, in its collective capacity as a commission.

II.

In the School Segregation Cases, 1954, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, the Supreme Court held that classification based on race is inherently discriminatory and violative of the Equal Protection Clause of the Fourteenth Amendment. This principle, originally stated

with respect to children in public schools, has been applied to golf courses,[3] parks,[4] beaches and swimming pools,[5] and buses and streetcars.[6] The application of the principle does not depend purely upon the fact that the school or the park is publicly owned; it rests on the fact that the discriminatory classification is enforced by state officials or state agencies. The Supreme Court has consistently defined state action as including action of any agency of the state at any level of government.[7]

The Commission relies on the argument that the rule and statute were adopted under the State's police power as a necessary measure to preserve peace and good order. Section 5 of Act 579 expressly states that: "This action is passed in the exercise of the State police power to regulate public health, morals and to maintain peace and good order in the State and shall be so construed." The same argument was made in Orleans Parish School Board v. Bush. Judge Tuttle for the Court of Appeals for the 5th Circuit answered the argument:

> "The use of the term police power works no magic in itself. Undeniably the States retain an extremely broad police power. This power, however,

[3] Holmes v. City of Atlanta, 5 Cir., 1955, 223 F. (2d) 93.

[4] Department of Conservation v. Tate, 4 Cir., 1956, 231 F. (2d) 615.

[5] City of St. Petersburg v. Alsup, et al., 5 Cir. 1956, 238 F. (2d) 830; Dawson v. Mayor and City Council of Baltimore City, 4 Cir., 1955, 220 F. (2d) 386, aff'd 350 U. S. 877, 76 S. Ct. 133, 100 L. Ed. 774.

[6] Morrison v. Davis, et al., 5 Cir., 1958, ... F. (2d) ; Browder v. Gayle, 1956, 142 F. Supp. 707, aff'd 352 U. S. 903, 77 S. Ct. 145, 1 L. Ed. (2d) 114.

[7] Virginia v. Rives, 1880, 100 U. S. 313, 25 L. Ed. 667; B & Q Railroad v. Chicago, 1897, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979; In Re Estate of Stephen Girard, 1957, 353 U. S. 230. 77 S. Ct. 806, 1 L. Ed (2d) 792.

as everyone knows, is itself limited by the protective shield of the Federal Constitution."

Dawson v. Mayor and City Council of Baltimore was a suit by negroes to enjoin enforcement of segregation at public beachhouses and bathhouses maintained by State and City authorities. The City of Baltimore argued that separation of races in public parks and beaches was customary in Maryland and necessary for the preservation of order. The Court of Appeals for the 4th Circuit held: "It is now obvious however that segregation cannot be justified as a means to preserve the public peace merely because the tangible facilities furnished to one race are equal to those furnished the other."

The principles set forth in Orleans Parish School Board v. Bush and Dawson v. Mayor and City Council of Baltimore are not confined to opinions in the Federal Reporter. Harvey v. Morgan[8] is a Texas case that is strikingly similar to the instant case. The Texas Penal Code prohibited "any fistic combat, match boxing, sparring or wreslting contest or exhibition between any person of the Caucasian or White race and one of the African or Negro race". This language is identical with the language in Rule 26 adopted by the State Athletic Commission of Louisiana. "Sporty" Harvey, a negro boxer, sued the Commissioner charged with administering the Act, seeking a declaratory judgment and mandatory injunction. The Court held that the Commissioner's rules and the Texas statute prohibiting white-negro fights constituted state action in violation of the Fourteenth Amendment and the Federal Civil Rights Act. The Texas Court conceded that professional boxing is an activity subject to rigid regula-

[8] Ct. Civ. App. Tex., 1954, 272 S. W. (2d) 621.

tion under police powers reserved to the State, but observed that "every state power, however, including the police power is limited by the inhibitions of the Fourteenth Amendment. . . . Even if riotous conditions did result from mixed boxing exhibitions we doubt if this statute would be sustained by the Federal Supreme Court in view of language which we find in some of its opinions".

III.

Act 579 does not raise difficult issues involving the meaning of a law or the unconstitutional application of a statute apparently constitutional. Act 579 is not intended to circumvent desegregation by clever verbiage or by adroit administrative techniques. Act 579 is in the teeth of the School Segregation Cases and other cases stemming from that decision; a clear challenge to the validity of those cases when a state legislature invokes the police power. In these circumstances this Court must hold with the plaintiff that, as to athletic contests, Act 579 of 1956 is unconstitutional on its face in that separation of negroes and whites based solely on their being negroes and whites is a violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. Rule 26 is of course no less unconstitutional.

We hold therefore that the plaintiff and other Negro prizefighters similarly situated are entitled to a temporary injunction restraining the State Athletic Commission of Louisiana from enforcing its Rule 26 and Act 579, insofar as Rule 26 and Act 579 prohibit the plaintiff and other negro fighters from engaging in boxing contests with white fighters or appearing on the same card with white fighters.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 5247
Civil Action

JOSEPH DORSEY, JR.,

Plaintiff,

versus

STATE ATHLETIC COMMISSION,

Defendant.

JUDGMENT OF INJUNCTION.

This cause came on for hearing on application of the plaintiff for a declaratory judgment and a temporary injunction. The Court, having carefully considered the arguments of counsel and the record made in this cause, and being of the opinion that the plaintiff should be granted the relief prayed for in his complaint:

IT IS ORDERED, ADJUDGED, AND DECREED that Rule 26 of the Rules and Regulations of the State Athletic Commission of Louisiana and Act 579 of 1956 of the Louisiana State Legislature (La. R. S. 4:451 et seq.) are unconstitutional insofar as they attempt to prohibit athletic contests between negroes and whites based solely on the contestants' race or color.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the defendant, State Athletic Commission, its officers, agents, servants, employees, and attorneys, and their successors in office, and those in concert with them who shall receive notice of this order, be and they are hereby restrained and enjoined from enforcing Rule 26 of the Rules and Regulations of the State Athletic Commission or any similar rule now or in the future enacted by the State Athletic Commission, and also from enforcing Act 579 of 1956 (La. R. S. 4:451 et seq.), insofar as the rules of the Commission and Act 579 attempt to prohibit the plaintiff or other negroes similarly situated from engaging in boxing contests and exhibitions with white fighters or appearing on the same card with white fighters solely on account of the fighters' or contestants' race or color.

Jurisdiction of this cause is retained for the purpose of giving full effect to this judgment and for the purpose of making such further orders and decrees, or taking such further action, if any, as may become necessary or appropriate to carry out and enforce this Court's judgment.

THUS DONE AND SIGNED at New Orleans, Louisiana, on this 28th day of November, 1958.

/s/ John Minor Wisdom
United States Circuit Judge

/s/ Herbert W. Christenberry
United States District Judge

/s/ J. Skelly Wright
United States District Judge

APPENDIX B.

ACT No. 579.

To prohibit all interracial dancing, social functions, entertainments, athletic training, games, sports or contests and other such activities, to provide for separate seating and other facilities for whites and negroes; to provide penalties for the violation of this Act, to provide a date on which this Act shall become effective, and to repeal all laws or parts of laws in conflict herewith.

Be it enacted by the Legislature of Louisiana:

Section 1. That all persons, firms and corporations are prohibited from sponsoring, arranging, participating in, or permitting on premises under their control any dancing, social functions, entertainments, athletic training, games, sports or contests and other such activities involving personal and social contacts, in which the participants or contestants are members of the white and negro races.

Section 2. That at any entertainment or athletic contests, where the public is invited or may attend, the sponsors or those in control of the premises shall provide separate seating arrangements, and separate sanitary, drinking water and any other facilities for members of the white and negro races, and to mark such separate accommodations and facilities with signs printed in bold letters.

Section 3. That white persons are prohibited from sitting in or using any part of seating arrangements and sanitary or other facilities set apart for members of the negro race; and members of the negro race are prohibited

from sitting in or using any part of seating arrangements and sanitary or other facilities set apart for white persons.

Section 4. Any person, firm or corporation violating the provisions of this Act shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than $100.00, or more than $1,000.00 and imprisoned for not less than 60 days or more than 1 year.

Section 5. This Act is passed in the exercise of the State Police Power to regulate public health, morals and to maintain peace and good order in the State and shall be so construed. This Act shall not become effective until the fifteenth (15th) day of October, 1956. None of the provisions of this bill shall be construed to apply to religious gatherings, services or functions.

Section 6. That any laws or parts of laws in conflict herewith be and the same are hereby repealed.

Approved by the Governor: July 16, 1956.

Rule 26 of the Rules and Regulations adopted by the Commission provides:

> "There shall be no fistic combat match, boxing, sparring, or wrestling contest or exhibition between any person of the Caucasian or 'white' race and one of the African or 'negro' race; and, further, it will not be allowed for them to appear on the same card."

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Office-Supreme Court, U.S.
FILED
APR 18 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 787

STATE ATHLETIC COMMISSION,

Appellant,

versus

JOSEPH DORSEY, JR.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

MOTION TO AFFIRM

LOUIS BERRY
4226 South Central Avenue
Los Angeles 11, California

ISRAEL M. AUGUSTINE, JR.
PRUDHOMME F. DEJOIE
1479 No. Claiborne Avenue
New Orleans 16, Louisiana

THURGOOD MARSHALL
JACK GREENBERG
Suite 1790
10 Columbus Circle
New York, N. Y.

Attorneys for Appellee

ELWOOD CHISOLM
JAMES M. NABRIT, III
Of Counsel

IN THE

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STATE ATHLETIC COMMISSION,

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MOTION TO AFFIRM

Appellee in the above-entitled case moves to affirm on the ground that the questions presented are so unsubstantial as not to need further argument.

Opinion Below

The opinion of the three-judge United States District Court for the Eastern District of Louisiana, New Orleans Division, is now reported at 168 F. Supp. 149.

Statutes

The statute and regulation declared unconstitutional by the District Court are Louisiana Revised Statutes of 1950, 4:451 et seq. (Acts 1956, No. 579), and Rule 26 of the Rules and Regulations of the State Athletic Commission.

Questions Presented

Appellee, for the purposes of this motion, adopts the "Questions" as presented by appellant at pages 3-4 of its Jurisdictional Statement.

REASON FOR GRANTING THE MOTION

The Questions Presented Are Unsubstantial

I.

Where a state agency purports to act under state authority and invades rights secured by the Federal Constitution it is subject to the process of the federal courts, and an action seeking appropriate relief against such an agency is not prohibited by the Eleventh Amendment.

Appellant State Athletic Commission concedes, as it must, that if this action had been brought against the individual members of the State Athletic Commission, that it would not be prohibited as a suit against the state within the meaning of the Eleventh Amendment to the Constitution of the United States.[1] However, appellant asserts that a distinction may be drawn between suits against individuals comprising a state board and suits against the state board, arguing that the principle uniformly applied to the former may not be applied against the latter.

[1] Among the many decisions by this Court which require the concession made by appellants are: Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273 (1906); Prout v. Starr, 188 U. S. 537 (1903); Smyth v. Ames, 169 U. S. 466 (1898); Tindal v. Wesley, 167 U. S. 204 (1897); Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362 (1894); Pennoyer v. McConnaughy, 140 U. S. 1 (1891); Ex Parte Young, 209 U. S. 123 (1908); Alabama Public Serv. Comm. v. Southern R. Co., 341 U. S. 341 (1951); Sterling v. Constantin, 287 U. S. 378 (1932); Georgia R. & Bkg. Co. v. Redwine, 342 U. S. 299 (1952); and many other cases collected at 43 A. L. R. 408.

The court below carefully considered the contention and it is submitted that its disposition of the question was eminently correct. After citing *School Board of Charlottesville* v. *Allen* (4th Cir. 1956), 240 F. 2d 59, cert. den. 353 U. S. 910 (1957) and *Orleans Parish School Board* v. *Bush* (5th Cir. 1957), 242 F. 2d 156, cert. den. 354 U. S. 921 (1957) the court below wrote at 168 F. Supp. 149, 151:

> "The short answer to the Commission's contention is that Dorsey's suit is not against the State of Louisiana, in name or in effect. It does not attempt to compel state action, but to prevent illegal action of the Commission. As Judge Tuttle stated in the Bush case: 'If in fact the laws under which the Board here purports to act are invalid, then the board is acting without authority from the State and the State is no-wise involved.' A state can act only through agents. Whether the agent is an individual official or a Commission, the agent ceases to represent the state when state power is used in violation of the United States Constitution.
>
> "There is no merit to the defendant's contention that the plaintiff should have sued the members of the boxing Commission individually. We agree with the court in School Board of City of Charlottesville v. Allen that . . . 'if high officials of the state and of the federal government may be restrained and enjoined from unconstitutional action, we see no reason why a school board [or any other state Commission] should be exempt from such suit merely because it had been given corporate powers.' In Browder v. Gayle, D. C., 142 F. Supp. 707, aff'd 352 U. S. 903, . . . the court indicated that it is not necessary to sue the members of a Commission individually when no special relief is sought against them by way of damages.

> In the case before us the plaintiff is seeking relief from action of the state's agent, the State Athletic Commission, in its collective capacity as a commission."

Furthermore, *Governor of Georgia* v. *Sundry African Slaves,* 26 U. S. 110 (1828), relied upon by appellant, does not support the argument made. That was an action against the Governor of a state rather than a state agency, but in any event it was litigated prior to the adoption of the Fourteenth Amendment. Cf. *Sterling* v. *Constantin,* 278 U. S. 378 (1932).

That the distinction urged by appellant is without merit is further demonstrated by *Hopkins* v. *Clemson Agricultural College,* 221 U. S. 636 (1911) in which no natural persons were named defendants. That case held:

> ". . . a void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them, or to obtain immunity through them, fails in his defense and in his claim of exemption from suit." (At 644)

Moreover, ". . . [I]t cannot matter that the agent is a corporation rather than a single man." *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corporation,* 258 U. S. 549, 567 (1922). The Fourteenth Amendment is addressed "to the states, but also to every person, whether natural or juridical, who is the repository of state power." *Home Telephone & Tel. Co.* v. *City of Los Angeles,* 227 U. S. 278, 286 (1913).

Disposing of an identical contention by reference to *Brown* v. *Board of Education,* 347 U. S. 483 (1954), the Fourth Circuit remarked in *School Board of Charlottesville* v. *Allen, supra* at 63, that it was "not reasonable to

suppose that the Supreme Court would have directed injunctive relief against school boards acting as state agencies, if no such relief could be granted because of the provisions of the Eleventh Amendment to the Constitution."

II.

A State Statute and an administrative regulation prohibiting prize fights between persons of different races plainly violates rights protected by the Fourteenth Amendment to the Constitution of the United States.

The opinion of the court below is unquestionably correct, and the appeal presents no substantial question on the merits, for the statute and regulation in question (1) effect a racial discrimination, contrary to the equal protection and due process clauses of the Fourteenth Amendment and (2) impair the right to pursue a lawful occupation contrary to the due process clause of that amendment.

(1) With respect to racial discrimination see, of course, *Brown* v. *Board of Education,* 347 U. S. 483 (1954); *Bolling* v. *Sharpe,* 347 U. S. 497 (1954). It has been repeatedly held, in cases relied upon by the court below, that the fundamental constitutional principles of the *Brown* and *Bolling* cases are not to be restricted to public education. *Browder* v. *Gayle,* 142 F. Supp. 707 (1956), affirmed 352 U. S. 903; *Dawson* v. *Mayor and City Council of Baltimore City* (4th Cir. 1955), 220 F. 2d 386, affirmed 350 U. S. 877; *Department of Conservation* v. *Tate* (4th Cir. 1956), 231 F. 2d 615 cert. den. 352 U. S. 838; *City of Petersburg* v. *Alsup* (5th Cir. 1956), 238 F. 2d 830 cert. den. 353 U. S. 922; *Morrison* v. *Davis* (5th Cir. 1958), 252 F. 2d 102 cert. den. 356 U. S. 968.

(2) Concerning the right of appellee to pursue his calling free from arbitrary racial restrictions it is to be remembered that while professional boxing is subject to regulation by the state, all regulation must be within the limitations imposed

by the Constitution of the United States. *Harvey* v. *Morgan*, Tex. Civ. App., 1954, 272 S. W. 2d 621 is similar to this case. The Texas Court of Civil Appeals, following the rationale of the *Brown* case, invalidated a statute which prohibited boxing matches, etc. between "any person of the Caucasian or 'white' race and one of the African or 'Negro' race."[2]

See *Truax* v. *Raich*, 239 U. S. 33, 41 (1915) in which the Court ruled that the authority of the states:

> . . . "does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood it requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

See also *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410 (1948); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886).

III.

The appellee had standing to challenge the statute and regulation involved herein.

Appellant's objection that appellee had no license as a prize fighter in Louisiana, *on the date of trial*, and that this fact deprives him of standing or sufficient interest to press this action is clearly unsubstantial. The statement of the Court below is a sufficient answer. The Court found that:

> Dorsey was issued a license for 1957. He has no license for 1958, but the Commission's policy is to issue a license to a prize fighter only on the date of a scheduled fight and then only after the fight has been

[2] The quoted phrase from the Texas statute is identical to a portion of Louisiana's Commission Rule 26, involved in this case.

held and the boxer's license fee deducted from his share of the purse. The Commission admits the essential allegations of Dorsey's complaint and admits also that it would not allow Dorsey to engage in a mixed prize fight in Louisiana. (At 168 F. Supp. 150-151)

And of course, it was admitted by the answer that Dorsey was licensed and in good standing when the action was commenced.

In any event, Dorsey's interest is no less substantial than that of the plaintiffs in *Truax* v. *Raich, supra,* at 38-39, and *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925).

CONCLUSION

For the foregoing reasons, the questions presented by appellant are clearly unsubstantial and this motion to affirm should be granted.

Respectfully submitted,

Louis Berry
4226 South Central Avenue
Los Angeles 11, California

Israel M. Augustine, Jr.
Prudhomme F. Dejoie
1470 No. Claiborne Avenue
New Orleans 16, Louisiana

Thurgood Marshall
Jack Greenberg
Suite 1790
10 Columbus Circle
New York, N. Y.

Attorneys for Appellee

Elwood Chisolm
James M. Nabrit, III
Of Counsel

FILE COPY

IN THE

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OCTOBER TERM, 1958

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STATE ATHLETIC COMMISSION,
Appellant,

versus

JOSEPH DORSEY, JR.,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

OPPOSITION TO MOTION TO AFFIRM.

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana,
Capitol,
Baton Rouge, Louisiana;

GEORGE PONDER,
First Assistant Attorney General,
State of Louisiana,
Capitol,
Baton Rouge, Louisiana;

WILLIAM P. SCHULER,
Assistant Attorney General,
Supreme Court Building,
New Orleans 12, Louisiana,
Attorneys for Appellant.

Montgomery & Co., "The Brief Specialists", 430 Chartres St. N. O., La.

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Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

OPPOSITION TO MOTION TO AFFIRM.

Appellant in the above entitled case reaffirms its position that this matter is one of great legal significance since it raises substantial and timely questions which have never been decided directly by this Court, the answers to which will provide guide posts to future state-federal relations.

REASONS FOR DENYING THE MOTION.

I.

Appellee cited several United States Supreme Court cases to support his contention that the District Court has the right to entertain jurisdiction of a suit against a

state agency, despite the fact that the state had not granted permission for such agency to be sued. These cases cited are not apposite. In all of these cases either the agency sued had been previously granted the authority to sue or be sued[1] or natural persons had been sued.[2]

Appellee places great weight and significance upon the case of *School Board of the City of Charlottesville v. Allen*, 240 F. (2d) 59. Appellant herein seriously questions the validity of the reasoning used by the Court in arriving at its decision.

First of all, the Court felt that there is no distinction between an individual government official and/or officials and a corporate agency of the state. Upon careful analization, the distinction is apparent. The State Official has two component parts: first, he is a natural person, and secondly, there is his official representative character of which, according to the doctrine enunciated in *Ex parte Young*, 209 U. S. 123 (1908), he is stripped in order that his person be subject to the consequences arising from his conduct. The State Agency, on the other hand, has nothing more or less than its representative capacity and should that be torn asunder, nothing remains against which the Court may act.

The second premise used by the Court in the *Charlottesville* case is equally untenable. The Court therein decided that since the question had not been raised in the

---

[1] Hopkins v. Clemson Agricultural College, 221 U. S. 636 (1911); Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549 (1922).

[2] Sterling v. Constantin, 287 U. S. 378 (1932); Home Telephone and Telegraph Co. v. City of Los Angeles, 227 U. S. 278 (1913).

Brown v. Board of Education case the Supreme Court must have decided that this procedure was legally correct.

Pretermitting the question as to whether or not silence on the part of the Supreme Court can create judicial precedent, there are two good reasons why the question was not asked nor answered. First, under the laws of Kansas, the school board has the right to sue and be sued.[3] Secondly, even if the right to sue were not granted, the immunity and privilege was waived by not urging the same.[4]

II.

Appellant concedes herein as it has already done in its jurisdictional statement that there are many phases in which this Court has applied the equal protection clause of the United States Constitution. However, appellant reaffirms its position taken in the jurisdictional statement that the matter herein concerned is not one which should or may be determined by the equal protection clause to the United States Constitution.

The cases cited by appellee with regard to opportunity to be gainfully employed deal with matters in which the type of employment is general and usual,[5] rather than specific and unusual, or in which the law is not applied equally to all persons in the field of endeavor.[6]

---

[3] General Statutes of Kansas, 72:1612.

[4] Missouri v. Fiske, 290 U. S. 19; Clark v. Barnard, 108 U. S. 436; Gunter v. Atlantic Coastline R. Co., 200 U. S. 273; Cunningham v. Macon and Brunswick R. Co., 109 U. S. 446.

[5] Truax v. Raich, 239 U. S. 33, 41 (1915).

[6] Yick Wo v. Hopkins, 118 U. S. 356 (1886).

CONCLUSION.

For the foregoing reasons, the questions presented by Appellant herein are clearly substantial and timely, and are of such a nature that they should be decided by this Court after oral argument by the parties involved.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana,
Capitol,
Baton Rouge, Louisiana;

GEORGE PONDER,
First Assistant Attorney General,
State of Louisiana,
Capitol,
Baton Rouge, Louisiana;

WILLIAM P. SCHULER,
Assistant Attorney General,
Supreme Court Building,
New Orleans 12, Louisiana,
Attorneys for Appellant.

PROOF OF SERVICE.

I, William P. Schuler, one of the attorneys for Louisiana State Athletic Commission, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of May, 1959, copies of the foregoing Opposition to Motion to Affirm were served on the plaintiff herein by mailing same in duly addressed envelopes with first class postage prepaid to his attorneys of record, as follows:

To Louis Berry,
4226 South Central Avenue,
Los Angeles 11, California (Air Mail);

To Israel M. Augustin, Jr.,
Prudhomme F. Dejoie
1470 No. Claiborne Avenue,
New Orleans 16, Louisiana;

To Thurgood Marshall,
Jack Greenberg,
Suite 1790,
10 Columbus Circle,
New York, N. Y. (Air Mail).

.....

WILLIAM P. SCHULER,
Assistant Attorney General
State of Louisiana.

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JAMES R. BROWNING, Clerk

IN THE

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Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

PETITION FOR REHEARING ON BEHALF OF APPELLANT.

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana,
Capitol,
Baton Rouge, Louisiana;
GEORGE PONDER,
First Assistant Attorney General,
State of Louisiana,
Capitol,
Baton Rouge, Louisiana;
WILLIAM P. SCHULER,
Assistant Attorney General,
Supreme Court Building,
New Orleans 12, Louisiana,
Attorneys for State Athletic Commission,
Appellant.

M[illegible] & Co., "The Brief Specialists", 430 Chartres St., N. O., La.

INDEX.

	Page
GROUND FOR REHEARING	1
CONCLUSION	7
CERTIFICATE OF SERVICE PURSUANT TO RULE 33 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES	8
CERTIFICATE OF COUNSEL PURSUANT TO RULE 58 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES	9

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PETITION FOR REHEARING ON BEHALF OF APPELLANT.

GROUNDS FOR REHEARING.

The Court should have entertained an appeal in this matter and granted the relief sought by appellant in the jurisdictional statement filed herein in order that the issues raised in the jurisdictional statement might be considered after briefing and oral argument before this Court.

The matters for consideration herein represent the problem of construction, interpretation, and application of the tenth, eleventh and fourteenth amendments to the U. S. Constitution.

(a) The sole defendant, as previously pointed out, was the Louisiana State Athletic Commission which is not an individual, nor a corporate entity authorized by the Legislature to sue or be sued. It is simply a bureau or agency of the State of Louisiana and as such, not a juridical person.

Appellant has already conceded and must continue to so concede that under a long line of jurisprudence, this suit might have been instituted against the members of the Athletic Commission if they were either exceeding their legal authority or acting under powers conferred by an unconstitutional statute. A careful study of the Federal jurisprudence convinced appellant that a suit directed solely against it was prohibited by the mandatory provisions of the eleventh amendment to the United States Constitution.

Maybe this Court did not feel that the interpretation of the jurisprudence by appellant was valid or presented a substantial question as to the jurisdiction of the district court. Possibly the Court believed that the cases cited by appellee decided by the fourth and fifth[1] circuits represents federal jurisprudence as a whole. Appellant pointed out earlier that the logic used in these cases is doubtful, and the following cases point up the fact that other Courts agree with appellant that an agency or administrative body may not be sued.

---

[1] School Board of Charlottesville v. Allen, 240 F. (2d) 59 (C. A., 4, 1956); Orleans Parish School Board v. Bush, 242 F. (2d) 156 (C. A., 5) Cert. den., 1957, 354 U. S. 921.

The Louisiana Land and Exploration Company v. State Mineral Board, 229 F. (2d) 5 (CA, 5, 1956):

"This brings us to a consideration of appellant's second point which is that the Eleventh Amendment is inapplicable and does not bar the present suit against a State agency which wrongfully has exceeded its statutory authority. **This contention is likewise without merit for the reason that the complaint is directed against the State Mineral Board in its official capacity, not against its members individually,** and because the acts complained of are not without, but clearly within the Board's statutory power." (Emphasis supplied).

Blackmar v. Guerre, et al., 342 U. S. 512, 72 S. Ct. 410 (1952):

"Since the Civil Service Commission is not a corporate entity which Congress has authorized to be sued, a suit involving the action of the Commission generally must be brought against the individual Commissioners as members of the United States Civil Service Commission. No such suit was brought here, and no service was had upon the individuals comprising the Civil Service Commission. Therefore, neither the individuals comprising the Civil Service Commission nor the Commission as a suable entity was before the District Court." (Emphasis supplied).

Aerated Products Co. of Philadelphia, Pa. v. Department of Health of New Jersey, et al., 159 F. (2d) 851, (C. A., 3, 1947):

"The Eleventh Amendment of the Federal Constitution denies to federal courts the jurisdiction over

suits against a State by citizens of another State. The Department is a part of the executive branch of the New Jersey government. Revised Statutes of New Jersey of 1937, 26:-2-1, et seq., N.J.S.A.; Board of Health v. Mundet Cork Corporation, 1939, 126 N. J. Eq. 100, 8 A. (2d) 105, affirmed 1940, 127 N. J. Eq. 61, 11 A. (2d) 260. **Consequently, we agree with the court below that plaintiff's suit against the Department is prohibited by the Eleventh Amendment.** Ford Co. v. Department of Treasury, 1945, 323 U. S. 459, 65 S. Ct. 347, 89 L. Ed. 389.

"As to Mahaffey, the rule is equally clear that **his function as a public official brings him within the protection of the Eleventh Amendment only if the statutes authorizing his actions are constitutional, and if his actions do not exceed the authority granted him.** Baldwin v. G. A. F. Seelig, 1935, 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032, 101 A.L.R. 55. If the activities of Mahaffey are in violation of a right guaranteed by the federal Constitution, this court has jurisdiction to enjoin such violation." (Emphasis supplied).

United States Department of Agriculture, et al., v. Hunder, et al., 171 F. (2d) 793, (C. A., 5, 1949):

"While cases may be found in which a department or bureau of the Government has been suffered to assert rights, **the Department of Agriculture is not truly a juridical person, being neither an individual nor a corporation. It is an agency of the Government, not empowered to sue, or to be sued in**

evasion of sovereign immunity. See United States Dept. of Agriculture v. Remund, 330 U. S. 539, 541, 67 S. Ct. 891, 91 L. Ed. 1082. The Secretary however is a person. If he by affirmative act exceeds his lawful authority or threatens to do so, to the injury of established rights, he may be enjoined, for in such circumstances he is not truly representing the Government." (Emphasis supplied).

New Haven Public Schools v. General Services Administration, 214 F. (2d) 592, (C. A., 7, 1954):

"It is admitted that the two defendants dismissed by the District Court are agencies of the executive branch of the United States government. In other words, they are administrative departments of the government. **It has long been established that such agencies are not truly juridical persons but are strictly representatives of the government, who may not be sued in evasion of sovereign immunity.** United States Dept. of Agriculture v. Remund, 330 U. S. 539, 541, 67 S. Ct. 891, 91 L. Ed. 1082; Herren v. Farm Security Administration, 8 Cir., 153 F. (2d) 76; Thomason v. Works Progress Administration, 9 Cir., 138 F. (2d) 342; North Dakota-Montana Wheat Growers' Ass'n v. United States, 8 Cir., 66 F. (2d) 573, 92 A. L. R. 1484, certiorari denied 291 U. S. 672, 54 S. Ct. 457, 78 L. Ed. 1061."

"Plaintiff seeks to escape the effect of this rule for the reason, as it argues, that the suit is controlled by decisions in actions rightfully brought against individual governmental officers. It is fatal, we

think, to this contention that no officers were named as parties or served with process. Indeed, such officers are subject to suit only in the District of Columbia. Blackmar v. Guerre, 342 U. S. 512, 72 S. Ct. 410, 96 L. Ed. 534. The District Court properly held that it did not have and could not entertain jurisdiction over the agencies." (Emphasis supplied).

As a result of the action of this Court in affirming the judgment of the District Court without opinion, the law with regard to the application and construction of the eleventh amendment is confused and unsettled. It is impossible to determine whether the previous jurisprudence, some of which is cited hereinabove, has been overruled, disregarded as not applicable or distinguished. In the interest of justice to the State of Louisiana as well as conformity and certainty in the interpretation and construction of the eleventh amendment, it is incumbent upon this Court to decide this matter by written opinion after full and complete briefing and argument thereon.

(b) There can be no doubt that the area of endeavor encompassed herein is entirely foreign to the matters previously decided by this Court, and that the regulation of professional boxing is within the police power of the State conferred by the tenth amendment to the United States Constitution. In addition to the cases already cited by appellant, the courts of Rhode Island and Georgia have held that the permission to engage in contests of this nature confers no right of which one may be deprived.

Zannelli v. Di Sandro, et al., 121 A. (2d) 652 (Sup. Ct., R. I., 1956);

Ward v. Drennon, et al., 40 S. E. (2d) 549 (Sup. Ct., Ga., 1946).

CONCLUSION.

Considering the argument and jurisprudence set forth in this petition as well as that in the jurisdictional statement and opposition to Motion to Affirm, it is submitted that this Court should reconsider its ruling affirming the District Court and entertain appellant's jurisdictional statement and place this suit upon the appellate docket of this Court, and after a briefing and rehearing thereon reverse the judgment of the District Court.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana,
Capitol,
Baton Rouge, Louisiana;

GEORGE PONDER,
First Assistant Attorney General,
State of Louisiana,
Capitol,
Baton Rouge, Louisiana;

WILLIAM P. SCHULER,
Assistant Attorney General,
Supreme Court Building,
New Orleans 12, Louisiana,
Attorneys for State Athletic Commission,
Appellant.

PROOF OF SERVICE.

I, William P. Schuler, one of the attorneys for Louisiana State Athletic Commission, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of June, 1959, copies of the foregoing Petition for Rehearing on behalf of appellant were served on the plaintiff herein by mailing same in duly addressed envelopes with first class postage prepaid to his attorneys of record, as follows:

To Louis Berry,
4226 South Central Avenue,
Los Angeles 11, California (Air Mail);

To Israel M. Augustin, Jr.,
Prudhomme F. DeJoie,
1470 No. Claiborne Avenue,
New Orleans 16, Louisiana;

To Thurgood Marshall,
Jack Greenberg,
Suite 1790,
10 Columbus Circle,
New York, N. Y. (Air Mail).

WILLIAM P. SCHULER,
Assistant Attorney General,
State of Louisiana.

CERTIFICATE OF COUNSEL.

I, William P. Schuler, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

.....

Counsel for Petitioner.